

**WAUKESHA COUNTY BOARD OF ADJUSTMENT
SUMMARY OF MEETING**

The following is a Summary of the Board of Adjustment Meeting held on Wednesday, June 9, 2004, at 6:30 p.m. in Room 255/259 of the Waukesha County Administration Center, 1320 Pewaukee Road, Waukesha County Wisconsin, 53188.

BOARD MEMBERS PRESENT: James Ward, Chairman
Robert Bartholomew
Paul Schultz
Walter Tarmann
Darryl Judson

BOARD MEMBERS ABSENT: None

SECRETARY TO THE BOARD: Mary E. Finet

OTHERS PRESENT: Town of Merton Board of Adjustment
Tosca Miller, BA04:040, fiancée of the petitioner
Jim Mella, BA04:040, house designer
Jacqueline Lefco, BA04:040, neighbor
Richard P. and Melissa Reith, BA04:042, petitioners
Atty. Maureen McGinnity, BA04:042, representing the petitioners
Kathy Carter, BA04:042, Court Reporter
Lawrence and Nancy Babb, BA04:042, neighbors
Daniel and Donna Willems, BA04:023, petitioners
Bernard S. Kubale, BA04:038, petitioner

The following is a record of the motions and decisions made by the Board of Adjustment. Detailed minutes of these proceedings are not produced, however, a taped record of the meeting is kept on file in the office of the Waukesha County Department of Parks and Land Use, and a taped copy or transcript is available, at cost, upon request.

SUMMARIES OF PREVIOUS MEETINGS:

Mr. Tarmann *I make a motion to approve the Summary of the Meeting of May 26, 2004, with the following corrections on Page 2 and Page 7:*

The motion in the case of BA04:035 Kenwood and Nancy Gauerke shall be changed to read as follows:

I make a motion to adopt the staff's recommendation, with the conditions stated in the Staff Report, with the exception of the following changes: Condition No. 1 shall include the following additional language "unless the petitioner provides evidence, which must be reviewed and approved by the Waukesha County Planning and Zoning Division, that the residence has been used

as a multi-family residence prior to the passage of the Ordinance". A condition shall be added stating, "The shed must be relocated to a conforming location or removed prior to the issuance of any zoning permits." The reasons shall remain the same as in the Staff Report.

The motion in the case of BA04:036 Dolores Piper shall be changed to include a Condition No. 6 requiring the submittal of a vegetative plan.

The motion was seconded by Mr. Ward and carried unanimously.

NEW BUSINESS:

BA04:040 STEVEN G. HORVATH

Mr. Schultz

I make a motion to adopt the staff's recommendation, as stated in the Staff Report, for the reasons stated in the Staff Report, with the following modification:

Condition No. 6 shall be changed to read as follows:

"The proposed residence and attached garage must be reduced in size so that the total floor area of the structure, including the first and second floors of the residence and the attached garage, does not exceed 2,200 sq. ft. There must be an attached garage of at least 400 sq. ft. The attic storage area over the attached garage must be accessible only via pull-down stairs from the garage and it must have a floor to ceiling height of less than 6 ft."

The motion was seconded by Mr. Judson and carried unanimously.

The staff's recommendation was for denial of variances from the shore setback and offset requirements, but approval of variances from the floodplain setback, floor area ratio, and open space requirements, subject to the following conditions:

1. The proposed residence must be located in conformance with the minimum shore setback requirement, utilizing the shore setback averaging provision of the Ordinance, of 26.5 ft. The shore setback shall be measured to the outer edge of the wall, provided the overhang does not exceed two (2) ft. in width. If the overhang exceeds two (2) ft. in width, the building must be located the additional distance from the lake as the overhang exceeds two (2) ft. in width.
2. The proposed decks must conform with the required shore setback, utilizing the shore setback averaging provision of the Ordinance, of 25 ft.

3. The proposed residence and attached garage must be located in conformance with the minimum offset requirement of 16.66 ft. from the side lot lines. The offset shall be measured to the outer edges of the walls, provided the overhangs do not exceed two (2) ft. in width. If the overhangs exceed two (2) ft. in width, the building must be located the additional distance from the side lot lines as the overhangs exceed two (2) ft. in width.
4. The proposed decks must conform with the required minimum offset of 10 ft. from the side lot lines.
5. The proposed residence, attached garage, and decks must be located in conformance with the road setback requirement, utilizing the road setback averaging provision of the Ordinance, of 12.7 ft. from the edge of the platted road right of way. The road setback shall be measured to the outer edge of the wall, provided the overhang does not exceed two (2) ft. in width. If the overhang exceeds two (2) ft. in width, the building must be located the additional distance from the road as the overhang exceeds two (2) ft. in width.
6. The proposed residence and attached garage must be reduced in size so that the total floor area of the structure, including the first and second floors of the residence, the attached garage, and any attic storage area over the attached garage that is accessible via any means other than pull-down stairs from the garage, does not exceed 2,000 sq. ft. This will result in a maximum floor area ratio of 25.6 %.
7. The first floor of the residence must contain at least 850 sq. ft.
8. Either the range or the refrigerator must be eliminated from wet bar area in the exposed basement.
9. Prior to the issuance of a zoning permit, a complete set of house plans, in conformance with the above conditions, must be submitted to the Planning and Zoning Division staff for review and approval.
10. Prior to the issuance of a zoning permit, a Plat of Survey showing the location of the proposed residence, attached garage, and decks, in conformance with the above conditions, must be prepared by a registered land surveyor and submitted to the Planning and Zoning Division staff for review and approval.
11. Prior to the issuance of a zoning permit, the Environmental Health Division must certify that the existing septic system can be utilized for the proposed residence, or a sanitary permit for a new waste disposal system must be issued and a copy furnished to the Planning and Zoning Division staff.
12. All wooden decks and concrete patios must be removed from the property.
13. New retaining walls will not be permitted unless the Planning and Zoning Division staff determines that they are necessary for erosion and sediment control.
14. Prior to the issuance of a zoning permit for the new residence, a detailed grading and drainage plan, showing existing and proposed grades and any proposed retaining walls, must be prepared by a registered landscape architect, surveyor, or engineer and submitted to the Planning and Zoning Division staff for review and approval. The intent is that the property be graded according to the approved plan, and also to provide that the drainage remain on the property or

drain to the lake, and not to the neighboring properties or the road. The following information must also be submitted along with the grading and drainage plan: a timetable for completion, the source and type of fill, a complete vegetative plan including seeding mixtures and amount of topsoil and mulch, an erosion and sediment control plan, and the impact of any grading on stormwater and drainage. This grading plan may be combined with the Plat of Survey required in Condition No. 10.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

It has not been demonstrated, as required for a variance, that denial of the requested offset and shore setback variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. The proposed residence and decks could be designed to conform with the offset and shore setback requirements with only minor modifications that would not be unnecessarily burdensome and would still provide a reasonable use of the property.

Conformance with the floodplain setback requirement, which would require the depth of the proposed residence to be reduced by approximately 6 ft., would be unnecessarily burdensome and would not be in conformance with the purpose and intent of the Ordinance, since the proposed residence would be elevated approximately 6 ft. above the 100-year flood elevation and would be no closer to the floodplain than the average of the floodplain setback of the adjacent residence to the east and the floodplain setback of the deck on the adjacent residence to the west. A hardship exists with respect to open space because it is impossible to conform with the minimum open space requirement of 10,000 sq. ft. when the lot area is only 7,820 sq. ft. Further, conformance with the maximum permitted floor area ratio of 15% would allow a total floor area of only 1,173 sq. ft., which would not be consistent with other development in the area and would not permit the construction of a house in conformance with the minimum required first floor area of 850 sq. ft. and even a minimally sized, two-car garage. However, it is felt that the proposed residence and attached garage are too large for lot and that the approval of the variances from the floor area ratio and open space requirements, as requested, would not be consistent with other development in the area. The approval of variances from the floodplain setback requirement and of variances from the floor area ratio and open space requirements, with the recommended modifications and conditions, would be consistent with other development in the area and not contrary to the public interest. Therefore, the approval of variances from the floodplain setback, floor area ratio, and open space requirements, with the recommended, modifications and conditions, is in conformance with the purpose and intent of the Ordinance.

BA04:04:042 RICHARD P. REITH

Mr. Tarmann

I make a motion to deny the request in accordance with the staff's recommendation, as stated in the Staff Report, for the reasons set forth in the Staff Report.

The motion was seconded by Mr. Judson.

After discussion, Mr. Judson removed his second and Mr. Tarmann withdrew his motion. Mr. Judson then made another motion

Mr. Judson *I move that we delay making a decision in this case until the next meeting, which is within 15 days (June 23, 2004), unless the petitioner grants the additional time until the first meeting in July (July 14, 2004), for the purpose of getting the Corporation Counsel's opinion on the interpretation of Section 3.15 (2) (A) of the Shoreland and Floodland Protection Ordinance.*

The motion was seconded by Mr. Tarmann and carried with three yes votes. Mr. Ward and Mr. Schultz voted no.

The staff's recommendation was for denial. The reasons for the recommendation, as stated in the Staff Report, are as follows:

It has not been demonstrated, as required for a variance, that denial of the requested variance would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. The property already contains a single-family residence, so denial of the requested variance would not prevent the owner from using the property for a permitted purpose, i.e. for a single-family residence. Further, denial of the requested variance would not be unnecessarily burdensome because the owner has the option to remodel the interior of the residence, provided the cost is less than 50% of the fair market value of the structure, or to utilize the previously granted variances (BA 03:024) to replace the residence with a new residence and attached garage.

The second requirement for a variance is unique physical conditions, which are not self-created and which prevent compliance with the Ordinance requirements. The physical limitations of the property, not the personal circumstances or desires of the property owner, are the basis for this test. Although the size of the property makes it impossible to construct a new residence in conformance with the floor area ratio and open space requirements, variances from those requirements have already been granted to permit the construction of a new residence and there are no physical limitations that would prevent the construction of a new residence in conformance with all locational requirements of the Ordinance.

The third requirement for a variance is that the variance must not adversely affect the general public interest or be detrimental to nearby properties or the natural resources in the area. The purpose and intent of the Ordinance is to "...prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and land uses; and preserve shore cover and natural beauty." Although the proposed remodeling will not increase the footprint of the residence and does not require variances from the open space requirement or to remodel a non-conforming structure in excess of 50% of its fair market value,

it will prolong the life of an extremely non-conforming structure, located only 22.6 ft. from the lake, that is detrimental to the water quality of the lake and does not contribute to a natural scenic shoreline. Therefore, it would not be in conformance with the purpose and intent of the Ordinance to grant the requested variance. Similarly, although they are special exceptions, rather than variances, and do not require the demonstration of an unnecessary hardship, it would not be within the purpose and intent of the Ordinance to grant the requested special exceptions from the offset and from the shore and floodplain setback requirements, to permit the proposed second floor expansion, the proposed extension to the existing first floor deck, or the proposed new deck on the second floor.

BA04:023 DANIEL WILLEMS

Mr. Judson

I make a motion to approve the proposed addition, with the following conditions:

1. *Prior to the issuance of a zoning permit, a complete set of building plans must be submitted to the Planning and Zoning Division staff for review and approval.*
2. *Prior to the issuance of a Zoning Permit, a stake-out survey, showing the location of the all structures on the lot and the proposed addition, must be prepared by a registered land surveyor and submitted to the Planning and Zoning Division staff for review and approval.*
3. *If any changes to the existing grade are proposed, a detailed grading and drainage plan, showing existing and proposed grades and any proposed retaining walls, must be prepared by a registered landscape architect, surveyor, or engineer and submitted to the Planning and Zoning Division staff for review and approval, prior to the issuance of a Zoning Permit. Any retaining walls within 5 ft. of the lot line will require approval from the Town of Merton Plan Commission and the Waukesha County Park and Planning Commission. If the implementation of that grading plan is found to require either a Minor Grading Permit or a Conditional Use Permit, the Minor Grading or Conditional Use Permit must be issued prior to the issuance of a Zoning Permit.*
4. *Prior to the issuance of a Zoning Permit, the non-conforming sheds must be removed from the property or relocated to conforming locations and the non-conforming patio near the lake must be removed.*

The reasons for approval are the topography and physical features of the land. It is a severe lot with a huge ravine and it would be costly and difficult to move the building farther from the side lot line.

The motion was seconded by Mr. Bartholomew and carried unanimously.

The staff's recommendation was for denial. The reasons for the recommendation, as stated in the Staff Report, are as follows:

It has not been demonstrated, as required for a variance, that denial of an offset variance for the proposed addition would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. The property already contains a two-bedroom residence, with approximately 1,200 sq. ft. on the first floor and an additional 800 sq. ft. of finished living area in an exposed lower level, so the owner is not prevented from using the property for a permitted purpose, i.e. for a single-family residence.

Denial of an offset variance to permit the construction of the proposed addition would not be unnecessarily burdensome because an attached garage could be constructed in conformance with the offset requirement. Although the petitioner desires to construct an addition to his residence that would also expand the living and storage areas of his residence, as well as provide him with a garage, the inability to construct an addition that would also expand the living and storage areas of the residence would not be unnecessarily burdensome, given the size of the existing residence. In addition, a detached garage, as originally proposed, but slightly modified to conform with the conditions of the special exception from the accessory building floor area ratio requirement that was granted by the Board of Adjustment on July 23, 2003 (BA03:064), could be located on the property in conformance with all locational requirements of the Ordinance. Therefore, although the desire for a garage is not unreasonable and the large ravine on the property is a limiting physical characteristic, there are other options for the construction of a garage that do not require an offset variance. Further, it would not be in conformance with the purpose and intent of the Ordinance to grant a variance that would permit the construction of an addition that would change a conforming structure into a non-conforming structure.

BA04: 038 BERNARD S. KUBALE

Mr. Tarmann

I move to approve the request in accordance with the staff's recommendation, as stated in the Staff Report, for the reasons set forth in the Staff Report.

The motion was seconded by Mr. Schultz and carried unanimously.

The staff's recommendation was for approval, with the following conditions:

1. The residence may be rebuilt on the existing foundation, provided certification from a structural engineer that the existing foundation is adequate to support the proposed residence is submitted to Planning and Zoning Division staff. If it is found that the foundation is not adequate to support the proposed residence, then the new residence must be redesigned to conform with the minimum offset requirement of 17.2 ft.

2. The new residence may have a wooden deck extending from the first floor on the lake side, but that deck must be located in conformance with the minimum offset requirement of 10.3 ft.
3. Prior to the issuance of a zoning permit, a complete set of house plans, showing the proposed residence and any proposed decks, must be submitted to the Planning and Zoning Division staff for review and approval.
4. Prior to the issuance of a zoning permit, a Plat of Survey showing the location of the proposed residence and attached garage, any proposed decks or patios, and the existing patio if it is to remain, must be prepared by a registered land surveyor and submitted to the Planning and Zoning Division staff for review and approval.
5. The existing concrete patio may remain, provided the Plat of Survey required above shows that it is located entirely on the subject property. If the Plat of Survey indicates that the patio encroaches onto the adjacent lot, that encroachment must be rectified, prior to the issuance of a zoning permit for the new residence.
6. If any changes to the existing grade are proposed, a detailed grading and drainage plan, showing existing and proposed grades and any proposed changes to the existing retaining walls or any proposed new retaining walls, must be prepared by a registered landscape architect, surveyor, or engineer and submitted to the Planning and Zoning Division staff for review and approval, prior to the issuance of a zoning permit. This is to ensure the construction of the new residence does not result in adverse drainage onto adjacent properties. The intent is that the property be graded according to the approved plan, and also to provide that the drainage remain on the property or drain to the lake, and not to the neighboring properties. The following information must also be submitted along with the grading and drainage plan: a timetable for completion, the source and type of fill, a complete vegetative plan including seeding mixtures and amount of topsoil and mulch, an erosion and sediment control plan, and the impact of any grading on stormwater and drainage.
7. Any proposed new retaining walls within 5 ft. of the side lot lines must be approved by the Town of Merton Plan Commission and the Waukesha County Park and Planning Commission, prior to the issuance of a zoning permit.
8. Prior to the issuance of a zoning permit, the Environmental Health Division must certify that the existing septic system is adequate for the proposed residence, or a sanitary permit for a new waste disposal system must be issued and a copy furnished to the Planning and Zoning Division staff.
9. A Declaration of Restrictions shall be prepared by the Planning and Zoning Division staff, stating that the upper level of the boathouse shall not contain any plumbing, bathroom, or kitchen facilities and it shall not be used for overnight habitation. Prior to the issuance of a zoning permit, the Declaration of Restrictions must be signed by the owner, notarized, and recorded in the Waukesha County Register of Deeds' office, and a copy furnished to the Planning and Zoning Division staff.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The steep slopes, the many trees, and the extensive system of retaining walls are unique property features that limit the area on the property that is suitable for the location of a new residence.

Compliance with the offset requirements would be unnecessarily burdensome and would require a new foundation, whereas granting the requested offset variance, with the recommended conditions, would allow the new residence to utilize the existing foundation. Utilizing the existing foundation is in the public interest and in conformance with the purpose and intent of the Ordinance, because it would preserve the existing trees on the property and limit the area of disturbance on the steep slopes. Denying the requested variances would result in construction of a new residence located only slightly farther from the side lot lines, which does not justify the greater disturbance to the steep slopes and the existing trees that would likely result from relocating the house site, especially since neither of the houses on the adjacent lots to the north or south are located in close proximity to the residence on the subject property. Finally, the required Declaration of Restrictions will ensure that all future owners are aware that the upper level of the boathouse cannot be used for overnight habitation or as a second living unit. Therefore, the approval of this request, with the recommended conditions, is in conformance with the purpose and intent of the Ordinance.

OTHER ITEMS REQUIRING BOARD ACTION:**ADJOURNMENT:**

Mr. Bartholomew *I make a motion to adjourn this meeting at 9:30 p.m.*

The motion was seconded by Mr. Schultz and carried unanimously.

Respectfully submitted,

Mary E. Finet
Secretary, Board of Adjustment